Supreme Court, U.S.
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No. 98-____

IN THE

Supreme Court of the United States

CHIBU C. ANAEME,

Petitioner,

v.

DIAGNOSTEK, INC.; HEALTH CARE SERVICES; *and* HPI,

Respondents.

On Petition For Writ of Certiorari To
The United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a violation of the Civil Rights Act of 1964 has occurred as a matter of law, or whether an employer's defense must as a matter of law be considered mere pretext rather than effective rebuttal, where a plaintiff has produced evidence to establish a *prima facie* case giving rise to a presumption of racial employment discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), where the employer's defense is the attempted dispute of an underlying fact (*i.e.*, that the plaintiff applied for employment) rather than an assertion of a "legitimate, nondiscriminatory reason" for rejecting the applicant, where the defendant has merely claimed the absence of any recollection or documentation of the fact at issue, and where the plaintiff has produced the defendant's written acknowledgment of the fact at issue.

II. Whether a Court's failure to bifurcate proceedings constituted reversible error due to the probability that exposure to inadmissible evidence resulted in a jury verdict contradicting the weight of the admissible evidence, where a jury was permitted to consider extremely prejudicial evidence, where such evidence was inadmissible for determining liability for racial employment discrimination, and where the only other evidence offered by an employer charged with rebutting a presumption of racial employment discrimination was a general, *de minimus* denial of any pattern of racially-biased hiring practices in the past.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. To petitioner's knowledge, there is no parent or subsidiary company of any party not already listed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CHIBU C. ANAEME,

Petitioner,

v.

DIAGNOSTEK, INC.; HEALTH CARE SERVICES; *and* HPI,

Respondents.

On Petition For a Writ of Certiorari To
The United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Chibu C. Anaeme respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been published but is reprinted in Appendix A at 1a. The District Court's Memorandum Opinion and Order denying petitioner's Motion for a New Trial is reprinted in Appendix B at 21a. The Judgment of the District Court is reprinted in Appendix C at 27a. The District Court's Memorandum Opinion and Order granting in part and dismissing in part the respondents'

motion for summary judgment is reprinted in Appendix D at 28a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on January 6, 1999. Justice Breyer enlarged the time for filing a petition for a writ of certiorari in this Court to May 17, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII") is set forth below:

> § 2000e-2. Unlawful employment practices
>
> (a) Employer practices
>
> It shall be unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which

would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

This controversy arose in Bernalillo County, New Mexico, where petitioner Chibu Anaeme, a black Nigerian American who had received a Bachelor of Science degree in pharmacy from the University of New Mexico in 1986, had been a licensed pharmacist since 1989. Respondents Health Care Services, Inc., and HPI Health Care Services, Inc., both subsidiaries of respondent Diagnostek, Inc., were at all relevant times licensed to conduct business in Bernalillo County, New Mexico, and routinely employed pharmacists in Albuquerque, New Mexico.

Between May of 1991 and September of 1994, the respondents advertised an intent to employ full and part-time pharmacists on more than 60 occasions. During that time, Mr. Anaeme repeatedly submitted applications and resumes, to which respondents provided written acknowledgments of receipt in at least four instances. These acknowledgments indicated the time frame within which the petitioner's application would remain pending before the submission of a new application and resume would be necessary. In reliance on these written acknowledgments, the petitioner continued to submit additional applications and resumes as necessary to maintain his job candidacy as pending during the period openings were advertised. The respondents did, in fact, hire more than 50 pharmacists in Albuquerque, New Mexico,

during this time. However, the respondents never so much as invited the petitioner to an interview for one of the advertised positions.

On September 8, 1994, the petitioner filed a racial discrimination claim with the Equal Employment Opportunity Commission (EEOC). Only then did the respondents first secure information which could have negatively impacted his employment prospects, had the information come to light during the hiring process. The respondents denied any recollection or the existence of any records indicating that Mr. Anaeme had submitted any employment applications. By obtaining copies of the applications from the EEOC, the respondents were able to identify omissions and inconsistencies. The respondents then examined the petitioner's background and discovered further weaknesses in his academic performance and employment history. However, the respondents never claimed an awareness of these facts during the hiring process.

Within 90 days of receiving from the EEOC a Notice of the Right to Sue, Mr. Anaeme filed claims under Title VII of the Civil Rights Act of 1964, alleging disparate treatment and disparate impact, as well as a claim under 42 U.S.C. § 1981, alleging racial discrimination, in the United States District Court for the District of New Mexico. Following the respondents' motion for summary judgment, the District Court dismissed only the petitioner's disparate impact claim.

A jury trial occurred from July 22 through July 25, 1996. The petitioner introduced evidence to establish his racial identity, his application for employment by an employer seeking applicants with his qualifications, his failure to receive

even an invitation to interview for a pharmacist position with the respondents, and that respondents continued to seek and to hire other applicants with identical qualifications. The respondents denied any recollection or the possession of any record which would demonstrate that the petitioner had applied for a position. The respondents also introduced testimony to indicate that they had hired some black applicants in the past and that race had never been a factor in prior hiring decisions.

At the appropriate times, the respondents moved for a directed verdict. The District Court denied each motion. At the close of the respondents' case, Mr. Anaeme moved for judgment as a matter of law. The District Court denied this motion, and the jury held for the respondents.

Mr. Anaeme moved for a new trial, arguing that the jury verdict contradicted the weight of the evidence and that a failure to bifurcate the proceedings had produced prejudicial error by permitting jury consideration of inadmissible "after-acquired" evidence. The District Court denied the petitioner's motion for a new trial.

On January 6, 1999, the United States Court of Appeals for the Tenth Circuit affirmed the District Court decision.

REASONS FOR GRANTING THE PETITION

This case raises a substantial question about the nature of "burden-shifting" under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), when racial employment discrimination is alleged. May a defendant sufficiently rebut a presumption of racial discrimination merely by claiming no recollection or

recording of an underlying fact, particularly where a plaintiff has introduced into evidence the defendant's own written acknowledgments of the fact at issue? Furthermore, may a failure to recall or to record an underlying fact, if stipulated, together with a general, *de minimus* denial of a history of unlawful discrimination, suffice to overcome the presumption of racial employment discrimination, or is it altogether more probable that exposure to inadmissible, "after-acquired" evidence may taint such a jury verdict?

The Tenth Circuit's judgment implies that a defendant's mere failure to recall evidence of the underlying facts in a discrimination case is sufficient to rebut a presumption of unlawful discrimination. This ruling must not hold because it offers disingenuous defendants a dangerous expediency, *i.e.*, to conceal racial discrimination behind a veil of lapses in memory or record-keeping. This outcome would render the *McDonnell Douglas* formula incoherent.

The Court's cases establish that if the racial identity of a qualified candidate for employment indicates an increased likelihood of discrimination and if the candidate was in fact denied employment, the defendant bears the burden of producing evidence to rebut a presumption of racial employment discrimination. The crux of Mr. Anaeme's claim is that the respondents, asserting only that they had no recollection or record of receiving applications from the petitioner, failed to meet their burden of production and failed to produce evidence sufficient to overcome the weight of the evidence provided by the petitioner. Thus, petitioner is entitled, in the first instance, to judgment as a matter of law and, in the alternative, to a new trial due to a jury finding contrary to the weight of the evidence.

I.

PETITIONER IS ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE HE ESTABLISHED A *PRIMA FACIE* CASE CREATING A PRESUMPTION OF RACIAL EMPLOYMENT DISCRIMINATION, WHICH RESPONDENTS FAILED TO REBUT

The model employed by this Court when evaluating burdens of proof in a Title VII action was established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The Court unanimously held that a complainant can create a presumption of racial employment discrimination by setting out a *prima facie* case. To do so, the plaintiff must show the following: (1) complainant's racial identity indicates minority status; (2) complainant was qualified for and applied for an opportunity for employment being offered by defendant; (3) complainant was nonetheless rejected from the pool of applicants; and (4) defendant continued to seek applicants with complainant's qualifications. *Id.* at 802. The same test is used to establish a claim under 42 U.S.C. § 1981. *Drake v. City of Fort Collins*, 927 F.2d 1156, 1159 (10th Cir. 1991).

Mr. Anaeme is a black Nigerian American who had received his Bachelor of Science in Pharmacy from the University of New Mexico in 1986. He had been licensed as a pharmacist in New Mexico since 1989, and he had applied for more than 60 employment opportunities advertised by the respondents between May of 1991 and September of 1994. Respondents acknowledged in writing at least four of these applications, but never offered to hire, or even to interview, the petitioner. Respondents continued to seek other applicants with Mr. Anaeme's qualifications.

The Tenth Circuit did not question the District Court's judgment that the petitioner had clearly established a *prima facie* case creating a presumption of racial employment discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). Once the complainant has established the *prima facie* case creating a presumption of racial employment discrimination, the defendant bears the burden of producing a "legitimate, nondiscriminatory reason" for the applicant's rejection. *Id.*

At this point in the analysis, one encounters difficulty in determining precisely which standard an employer must meet in producing evidence to sufficiently rebut the presumption. This Court has implied that an employer may sufficiently rebut the presumption merely by raising a genuine issue of fact as to whether the alleged discrimination occurred. *Id.* at 254-55. Yet, this formulation of the standard begs the question: may an employer's unsupported assertion cast sufficient doubt on the underlying facts so as to rebut a presumption of unlawful discrimination, even if the employer's "evidence" consists merely of a convenient lapse in memory or record-keeping, and even if the assertion is directly contradicted by concrete evidence of the employer's own written acknowledgment of the underlying fact? The answer lies in this Court's stipulation that an employer must rely only on "admissible evidence" to articulate a *reason for rejecting the applicant* in question. *Id.* (emphasis added). Elsewhere, the Court has required that an employer "introduce evidence which, *taken as true*, would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993) (emphasis in original).

In the instant case, the respondents failed to satisfy their burden. The respondents claimed only that they had no recollection nor any record of receiving the petitioner's employment applications. Thus, the respondents asserted, petitioner had never applied for the advertised positions. Yet, an absence of evidence to confirm petitioner's claim that his application was on file, *if true*, does not contradict the concrete, written acknowledgments produced by petitioner, nor does it *permit* a nondiscriminatory reason for rejecting petitioner's application so much as argue that the application never existed. Rather, the respondents have offered only an unsupported assertion to suggest that the petitioner was never a party to the hiring process.

Since the absence of recollection or of records to confirm the petitioner's evidence could hardly constitute a *reason* for rejecting an applicant, the respondents have indeed attempted to allege a dispute as to the underlying facts establishing the *prima facie* case and, hence, the presumption of unlawful discrimination. Yet, this tack fails because Mr. Anaeme introduced into evidence the respondents' own written acknowledgments of receiving at least four of the applications at issue. Thus, the only genuine factual dispute that could arguably exist is whether the petitioner had applied for only four, as opposed to 60, positions. Even if genuine, such a factual dispute is not material, since the model adopted by this Court in *McDonnell Douglas* stipulates no minimum number of applications essential to the *prima facie* case. The four applications acknowledged by the respondents remain sufficient to create a presumption of racial employment discrimination. That respondents allege no recollection or record of receiving additional applications is irrelevant to establishing a *prima facie* case since the acknowledged facts

in evidence produced by the petitioner satisfy the necessary preponderance of the evidence. *Burdine*, 450 U.S. at 252-53. The essential point remains that a qualified applicant was rejected, presumably due to racial identity unless respondents can point to a legitimate alternative basis.

The respondents argue, on the one hand, that they never received an application. On the other hand, since the evidence does not remotely support their first claim, they offer the weakness of their case -- the total lack of evidence of an alternate reason for rejecting the applicant -- as their vindication. Unfortunately, the Tenth Circuit, by focusing its analysis on the interests of employers who find themselves in the "unique" position of no memory or records with which to supply a reason for rejecting a given applicant, allowed the respondents to have it both ways.

The Tenth Circuit's decision could quite easily encourage *less* record-keeping and greater forgetfulness by employers who wish to engage in unlawful discrimination. The effect of the Tenth Circuit's decision would be to create the bizarre state of affairs in which any single charge of racial bias, no matter how frivolous and unsubstantiated the defense, would be decided by a jury so long as the employer charged has no record and no memory of an applicant at the time of trial.

Petitioner notes that the only other evidence offered by the respondents was general, *de minimus* testimony that no specific pattern of racial discrimination had existed in the past. Again, even if true, this evidence simply does not rebut the *prima facie* case creating a presumption of racial employment discrimination. To do so, it must assert a "legitimate, nondiscriminatory reason" for rejecting the applicant. The

respondents cannot assert a legitimate, nondiscriminatory reason for rejecting an applicant while simultaneously claiming the applicant was never considered, particularly where all facts which may have legitimately weakened the petitioner's prospects were learned by the respondents after the hiring process had been completed and after the initial stages of the litigation process had commenced.

Thus, the Tenth Circuit erred when it determined that the respondents had met their burden of production and had offered sufficient rebuttal evidence to permit the jury to determine whether the presumption of racial employment discrimination had been created, and whether if it had been created, it had survived intact after presentation of the respondents' case.

II.

PETITIONER IS ENTITLED TO A NEW TRIAL BECAUSE THE JURY'S HOLDING CONTRADICTED THE WEIGHT OF THE EVIDENCE

Given that the only evidence respondents offered ostensibly to negate did not, in fact, rebut the presumption of racial employment discrimination, only the consideration of certain inadmissible "after-acquired" evidence could have supported the jury's holding for the defendants. The "after-acquired" evidence included omissions and inconsistencies in petitioner's employment applications, the fact that petitioner had been terminated by a previous employer, and evidence suggesting that petitioner had exhibited questionable work habits.

This "after-acquired" evidence was rightfully inadmissible regarding liability because by its nature it could not have been considered at the time Mr. Anaeme was rejected as a job applicant. Respondents never claimed to have considered this evidence and, in fact, insisted that they held no recollection or records to indicate that petitioner had ever submitted employment applications. Nonetheless, this evidence was admissible to mitigate damages, and it undoubtedly proved highly prejudicial to the petitioner. No other rationale can explain the jury's holding for the respondents.

Aside from the respondents' general, *de minimus* denial of past racial bias and their assertion that they have hired some black applicants in the past, the respondents claim only that they have no recollection nor any record of receiving the petitioner's employment applications. Thus, the respondents assert, petitioner never applied for the advertised positions. This conclusion does not follow; the respondents' own lack of recollection or records to confirm petitioner's evidence against them hardly constitutes evidence within the meaning of *McDonnell Douglas*. Absent consideration of the inadmissible, prejudicial evidence, no jury could rationally view a lack of respondent-produced evidence to confirm the petitioner's case as more credible or compelling than petitioner-produced evidence that the respondents had actually acknowledged, in writing, the fact at issue.

The more compelling conclusion is that the District Court had improperly failed to bifurcate the proceedings, and that failure resulted in prejudice sufficient to produce a verdict contradicting the weight of the evidence. Thus, even if the Tenth Circuit had properly determined that the respondents' absence of recollection or records to substantiate petitioner's

assertion of the underlying facts did constitute a sufficient rebuttal of petitioner's *prima facie* case creating a presumption of racial employment discrimination, the Tenth Circuit erred by failing to overrule the District Court's denial of petitioner's motion for a new trial.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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May 17, 1999

APPENDIX A
OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE TENTH DISTRICT
DATED JANUARY 6, 1999

CHIBU C. ANAEME, PLAINTIFF - APPELLANT,

v.

DIAGNOSTEK, INC.; HEALTH CARE SERVICES; AND HPI, DEFENDANTS - APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
(D.C. No. CIV-95-684-SC)

Susan G. Chappell (Paul Livingston with her on the briefs), Albuquerque, New Mexico, for Plaintiff-Appellant.
Gregory L. Wilmes of Wilmes & Associates, Minneapolis, Minnesota (Julie Savoie Wingert, General Counsel, MedManagement, LLC, Plymouth, Minnesota, with him on the brief), for Defendants-Appellees.

Before Porfilio, McKAY, and Brorby, Circuit Judges.

The opinion of the court was delivered by: McKAY, Circuit Judge.

In June 1995, Plaintiff Chibu Anaeme brought an action against Defendants Diagnostek, Inc., Health Care Services, and HPI in which he claimed disparate treatment and disparate impact under Title VII and racial discrimination under 42 U.S.C. Section 1981. This case stems from Plaintiff's alleged submission to Defendants of approximately sixty employment applications for a staff pharmacist position between 1991 and 1994. Plaintiff received his Bachelor's Science degree in Pharmacy from the University of New Mexico in 1986 and became a licensed pharmacist in New Mexico in 1989. In his complaint, Plaintiff alleged that Defendants discriminated against him on the basis of his race(Nigerian American) by failing to hire him or even interview him for a position as a staff pharmacist.

The district court granted summary judgement in favor of Defendants on Plaintiff's disparate impact claim,[1] but it denied summary judgement on the disparate treatment and section 1981 claims. At the close of Defendants' case at trial, Plaintiff moved for a judgement as a matter of law. The court denied his motion. Subsequently, the jury found that Plaintiff's race was not a determining factor in Defendants' failure to hire him. Plaintiff moved for a new trial on three grounds: (1) the jury's verdict was contrary to the weight of the evidence; (2) after-acquired evidence prejudiced the jury despite an instruction not to consider this evidence in determining liability; and (3) the judgment was a miscarriage of justice. The district court denied the motion for a new trial. Plaintiff appeals the district court's denial of his motions for a

[1] It is not clear whether Plaintiff appeals the district court's partial grant of summary judgment to Defendants on his disparate impact claim. Because Plaintiff has not argued this issue in his brief or in oral argument, he has waived it and we do not address it. *See Abercrombie v. City of Catoosa, Okla.*, 896 F.2d 1228, 1231 (10TH Cir. 1990).

judgment as a matter of law and a new trial. We exercise jurisdiction pursuant to 28 U.S.C. Section 1291.

I.

Plaintiff's primary contention on appeal is that he was entitled to a judgment as a matter of law before Defendants failed to produce a legitimate, nondiscriminatory reason for not hiring him. He asserts that after he established a prima facie case of racial discrimination, Defendants did not meet their burden of providing a legitimate, non discriminatory reason for the alleged discriminatory action. In response, Defendants assert that they came forward with a legitimate, nondiscriminatory reason for not hiring Plaintiff, namely, that they had n o record of receiving his applications. Defendants claim that they supported this explanation at trial with admissible evidence showing that they had no record of Plaintiff's applications, which indicated to them that he did not apply for a job. Defendants also assert that admissible evidence supported their explanation by indicating that, even if they had received any of Plaintiff's applications, they either lost them, discarded them after a period of time, or rejected them for facial deficiencies. Moreover, Defendants argue, they did not discriminate against Plaintiff on the basis of his race, and Plaintiff did not meet his ultimate burden of proving racial discrimination.

Applying the same standard as the district court, we review de novo the district court's denial of a motion for judgment as a matter of law. *See Mason v. Oklahoma Turnpike Auth.*, 115 F.3d 1442,1450 (10th Cir. 1997). Judgment as a matter of law "is warranted only if the evidence points but one way and is susceptible to no reasonable inferences supporting the party

opposing the motion. "Id. In reviewing a motion for judgment as a matter of law, we must construe the evidence and the inferences therefrom most favorably to the nonmoving party. *See Wolfgang v. Mid-America Motorsports, Inc.*, 111 F.3d 1515, 1522 (10th Cir. 1997). "[W]e may not weigh the evidence, [assess] the credibility of witnesses, or substitute our judgment for that of the jury." *Id.*; *see also Mason*, 115 F.3d at 1450.

Title VII of the Civil Rights Act of 1964 prohibits the failure or refusal to hire any individual on the basis of race, color, religion, gender, or national origin. *See* 42 U.S.C. Section 2000e-2(a)(1). Under Title VII, the crucial inquiry is whether "the defendant intentionally discriminated against the plaintiff." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The Supreme Court has explained that a plaintiff may prove intentional discrimination either by direct or circumstantial evidence. *See United States Postal Serv. Bd. of Governors v. Aiken*, 460 U.S. 711, 714 n.3 (1983); *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 526 (1993) (Souter, J., dissenting) (stating the McDonnell Douglas framework allows "plaintiffs and courts to deal effectively with employment discrimination revealed only through circumstantial evidence"). Because no direct evidence of intentional discrimination existed in this case, Plaintiff utilized the burden-shifting format established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to attempt to show intentional discrimination.

Where the plaintiff must prove his case by circumstantial evidence, as here, he first must make out a prima facie case of discrimination. *See id.* at 802-04 (setting forth the burden-shifting framework). To establish a prima facie of disparate

treatment as a result of the prospective employer's failure to hire, a plaintiff must show that (1) he applied for an available position; (2) he was qualified for the position; and (3) he "was rejected under circumstances which give rise to an inference of unlawful discrimination." *Burdine*, 450 U.S. at 252-53; *see McDonnell Douglas*, 411 U.S. at 802. The establishment of the plaintiff's prima facie case creates a presumption that the defendant unlawfully discriminated against the plaintiff. *See Burdine*, 450 U.S. at 254. The defendant then must articulate a legitimate, nondiscriminatory reason for the failure to hire that plaintiff. See id. If the defendant has produced such a justification, the plaintiff then has the opportunity to convince the jury that the reason offered by the defendant is merely pretext and that the defendant's adverse employment action was motivated by racial discrimination. *See Hicks*, 509 U. S. at 508, 515-16.

The ultimate question under Title VII of whether the defendant intentionally discriminated against the plaintiff is one for the trier of fact to decide. *See id.* at 518-19 (*citing Aikens*, 460 U.S. at 714-16); *Elmore v. Capstan, Inc.* 58 F.3d 525, 527 (10th Cir. 1995). Consequently, once the McDonnell Douglas framework of presenting proof is complete, "we are left with the'single overarching issue whether [the] plaintiff has adduced sufficient evidence to warrant [the trier of fact's] determination that adverse employment action was taken against him on the basis of [race].[2]'" *Elmore*, 58 F .3d at 530 (*quoting Fallis v. Kerr-*

[2] The Supreme Court has stated that once a defendant produces evidence of a legitimate, nondiscriminatory reason, "the factfinder then must decide whether the [action] was discriminatory" and "the *McDonnell-Burdine* presumption drops from the case." *Aikens*, 460 U.S. at 715. In light of this directive, we repeatedly have recognized that, after a full trial on the merits, the steps in the burden-shifting framework of *McDonnell Douglas* are

McGee Corp., 944 F.2d 743, 744 (10th Cir. 1991). In this regard, "'the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" *Hicks*, 509 U.S. at 507 (*quoting Burdine*, 450 U.S. at 253).

The district court's finding that Plaintiff "satisfied the minimal requirements' of a prima facie case is not disputed. *Id.* at 506. Instead, Plaintiff challenges the court's determination that Defendants met their burden of production by articulating a legitimate, nondiscriminatory reason for not hiring him. He contends that Defendants failed to meet this burden for two reasons: (1) Defendants cannot base their reason on inadmissible after-acquired evidence; and (2) Defendants' explanation did not raise a genuine issue of material fact because it was disputed by four letters from Defendants to Plaintiff indicating that they received four of his applications. Therefore, Plaintiff claims, the presumption of unlawful remained unrebutted and he entitled to a judgment as a matter of law. Plaintiff's arguments are without merit for a number of reasons.

First, we believe that Defendants met their burden of production. The defendants' burden to articulate a nondiscriminatory reason has been characterized as an "exceedingly light" one. *Perryman v. Johnson Prods. Co.*, 698 F.2d 1138, 1142 (11th Cir. 1983). "The defendant need

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largely irrelevant, *see, e.g., Elmore*, 58 F.2d at 503 n. 7; *Sanchez v. Phillip Morris Inc.*, 992 F.2d 244, 246 (10th Cir. 1993); *Ortega v. Safeway Stores, Inc.*, 943 F.2d 1230, 1237 (10th Cir. 1991). However, because we believe that Plaintiff fundamentally misunderstands the requirements of the law in this arena, we elect to address his argument that Defendants' failure to present admissible evidence of a nondiscriminatory reason for not hiring him required a judgment as a matter of law in his favor.

not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Burdine*, 450 U.S. at 254-55. To satisfy this burden, "the employer need only produce admissible evidence which allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *Id.* at 257. However, "the determination that a defendant has met its burden of production...involve[s] no credibility assessment." *Hicks*, 509 U.S. at 509. The Supreme Court emphasized in Hicks that, "[b]y producing evidence (whether ultimately persuasive or not) of nondiscriminatory reasons, [employers] sustain [ ] their burden of production, and thus place [ ] themselves in a better position than if they had remained silent.'" *Id.*

Defendants met their burden by articulating a legitimate, nondiscriminatory reason and by supporting it with trial testimony. Their explanation, however, is unique because Plaintiff was not known to or remembered by Defendants when this suit was filed. Consequently, the premise of Defendants' explanation was that, based on their review of their personnel records and application files, they had no record that Plaintiff ever applied for a pharmacist position. Several employees testified about this explanation. Pamela Otero testified that she was unable to locate any applications made by Plaintiff. Teresa Michael and Mark Eastham testified that they had no recollection of any applications Defendants might have received. Ms. Michael and Mr. Eastham further testified that, because they could not find any of Plaintiff's alleged applications, they deduced that Defendants had not received any. Mr. Woodrow Storey, a former pharmacy manager and hiring manager for Defendants, testified that he

had never seen any applications from Plaintiff and that he knew no other person who might have. He also testified that Plaintiff's applications could have been lost or misplaced and likely would have been discarded if they contained facial omissions. Additionally, the applications and resumes produced by Plaintiff during discovery contained omissions and inconsistencies on questions about employment history, dates of employment, names and phone numbers of supervisors, and the like, and they indicated that Plaintiff had held many positions but had not remained in any one position for very long. According to testimony at trail, Defendants' practice was to reject any application containing such facial deficiencies.

In effect, the reason proffered and the evidence presented by Defendants was grounded in their lack if knowledge as to who Plaintiff was, what kind of applicant he was, and why they did not hire him. Because of this lack of knowledge, Defendants could only make reasoned judgments about why they did hire or interview Plaintiff. Defendants surmised that they had no record of Plaintiff's applications because (1) he never applied, (2) his applications were lost or discarded by the personnel department, or (3) his applications were rejected because of facial deficiencies. Prospective employers who are in this unique and seemingly uncommon posture should not be stuck without a legitimate, nondiscriminatory explanation, and we know from Hicks that their only alternative-remaining silent-would place them in an untenable position. *See id.* (stating that producing evidence of a nondiscriminatory reason is better than saying nothing at all, even if the evidence is not ultimately persuasive). If we accepted Plaintiff's argument, such prospective employers would never be able to rebut a prima facie case because they would be unable to

proffer a reason other than that they did not have a record of their relationship to the plaintiff. This result is not consistent with the intent of Title VII or our case law. Accordingly, we conclude that Defendants' explanation is the only legitimate one that they possibly could have proffered which "would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *Burdine*, 450 U.S. at 257.

Second, Plaintiff's arguments fail because Defendants' legitimate, nondiscriminatory reason is not based on inadmissible after-acquired evidence. Instead, evidence concerning the quality of Plaintiff's applications and resumes and the nature of his employment history simply constitutes circumstantial proof of Defendants' legitimate, nondiscriminatory reason for not hiring Plaintiff. This evidence helps to explain Defendants' general employment practices by showing how they customarily responded to applications similar to Plaintiff's. From this circumstantial evidence, the jury could infer that Defendants did not intentionally discriminate against Plaintiff on the basis of race.

Our characterization of the evidence regarding Defendants' general hiring practices and the evidence about Plaintiff's applications, resume, and employment history conflicts with Plaintiff's characterization. Plaintiff argues that the disputed evidence is the type of after-acquired evidence contemplated in *McKennon v. Nashville Banner Publishing Co.*, 513 U. S. 352 (1995). In *McKennon*, the Supreme Court held that where an employee's discharge was based solely on her age and the employer later discovered wrongful conduct by the employee that would have led to her discharge, the employee was not barred from relief under the Age Discrimination in

Employment Act. *See id.* at 358-60. Although the Court determined that the after-acquired evidence concerning the employee's wrongful conduct could not be used to preclude her from obtaining relief for intentional discrimination, it held that such evidence could limit the employee's claim of damages.[3] *See id.* at 361-62. Two factors critical to the Court's decision in McKennon distinguish it from this case.

The Supreme Court emphasized in *McKennon* that its holding was partly premised on the employer's concession, for summary judgment purposed, that the sole reason for the employee's discharge was intentional age discrimination. *See id.* at 359. In this case, however, Defendants did not concede discrimination for any purpose. In fact, the trial court was engaged in the very process of ascertaining the motive for the failure to hire Plaintiff, which is "an essential element in determining whether the employer violated the federal antidiscrimination law." *Id.* at 360. Unlike in *McKennon*, where the question of whether intentional discrimination occurred was not at issue, whether Defendants intentionally discriminated against Plaintiff on the basis of race is the crux of this case.

The Court also based its holding in *McKennon* on the nature of the after-acquired evidence: Ms. McKennon's deposition testimony revealed that she had engaged in grave misconduct during her employment which would have constituted legitimate grounds for her discharge. *See id.* at 356. This case is entirely different from the controlling acts in *McKennon* because Plaintiff obviously was never employed

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[3] We note that this second part of McKennon, holding that after-acquired evidence may be considered for the question of the plaintiff's damages, is not helpful to our analysis in this case. No issue of damages is before this court.

by Defendant at any time. Further, unlike the employer in *McKennon*, Defendants do not contend that Plaintiff engaged in any misconduct that should excuse their alleged discriminatory behavior. Instead, much of the evidence at issue relates either to Plaintiff's employment history before he ever applied for a position with Defendants or to Defendants' general hiring practices existing at the time Plaintiff allegedly applied for jobs. *Cf. Carr v. Woodbury County Juvenile Detention Ctr.*, 905 F. Supp. 619, 627 (N.D. Iowa 1995) (declining to extend employer's *McKennon* defense to limit damages to plaintiff's post-termination conduct); *Sigmon v. Parker Chapin Flattau & Klimpl*, 901 F. Supp. 667, 628-83 (S.D.N.Y. 1995) (same). Moreover, the evidence to which Plaintiff objects was elicited by Defendants to question the accuracy or veracity of Plaintiff's testimony that he was qualified, that he was a stellar candidate, and that he even applied for as many positions as he said he did. It is clear that once we have accepted that Defendants met their burden of producing a legitimate, nondiscriminatory reason, the issue of whether Plaintiff's prima facie case is supported by a preponderance of the evidence is still before the trier of fact. *See Hicks*, 509 U.S. at 509-515; *Aikens*, 460 U.S. at 715. Thus, Defendants were permitted to litigate whether Plaintiff was qualified for a pharmacist position, and they were entitled to submit evidence about Plaintiff's qualifications in this regard. In short, *McKennon*'s discussion on after-acquired evidence does not apply to this case and the evidence to which Plaintiff objects was nonetheless admissible to show that Plaintiff's prima facie case was not supported by a preponderance of the evidence.

Additionally, in this case, Defendants' proffered reason did not so much speak to their motivations as it did to their

actions in failing to hire Plaintiff. In other works, Defendants claim that they did not hire Plaintiff because they had no record of his having applied for a position, which must mean either that (1) he did not apply for a pharmacist position, (2) they lost or discarded his applications, or (3) they rejected his applications because they contained facial omissions and thus did not merit further examination. Because Defendants simply did not know who Plaintiff was, their proffered reason does not explain what motivated them or what their intent was as to Plaintiff's applications. For these reasons, we do not believe that *McKennon* was intended to encompass this unusual situation where the prospective employer has no recollection of the prospective employee. We hold that Defendants' legitimate, nondiscriminatory reason is supported by admissible circumstantial evidence of their employment practices and Plaintiff's resumes, applications, and employment history.

Third, Plaintiff is not entitled to a judgment as a matter of law merely because he presented evidence that may have contradicted Defendants' legitimate, nondiscriminatory reason. During discovery and at trial, Plaintiff presented four letters from Defendants which indicated that they have received four of Plaintiff's applications. Generally, evidence challenging the defendant's legitimate, nondiscriminatory reason goes to the plaintiff's burden of establishing pretext. "Evidence discrediting an employer's nondiscriminatory explanation," *McCullough v. Real Foods Inc.*, 140 F.3d 1123, 1128 (8th Cir. 1998), may be sufficient to persuade the trier of fact of racial intent "in some cases but not in all cases." *Nelson Boatmen's Bancshares, Inc.*, 26 F.3d 796, 801 (8th Cir. 1994). This is because "[i]t is not enough ... to disbelieve the employer; the fact finder must believe the plaintiff's

explanation, of intentional discrimination ." *Hicks*, 509 U.S. at 519; accord *McCullough*, 140 F .3d at 1128 (nothing that Supreme Court has "made clear that a plaintiff in a pretext case must establish 'both that the reason was false, and that discrimination was the real reason'") (citations omitted); *cf. Hurd v. Pittsburg State Univ.*, 109 F.3d 1540, 1548 (10th Cir. 1997) (holding, in context of challenge to peremptory strike of juror, that plaintiff must persuade fact finder that reason proffered was unworthy of belief and that the adverse action was racially motivated).

Accordingly, Plaintiff's attack on the credibility of the proffered explanation does not mean either that the explanation fails to raise a genuine issue of fact or that a judgment for him is required. *See Hicks*, 509 U.S. at 504, 508-11 (stating that trier of fact's rejection of employer's asserted reasons for its action does not mandate a finding for plaintiff). The Supreme Court stated in *Hicks* that a plaintiff who makes a prima facie case is not entitled to judgment as a matter of law even where the fact finder disbelieves or rejects the employer's [proffered reasons. See id. at 509-10. The Court emphasized that "*McDonnell Douglas* does not say ... that all the plaintiff need do is disprove the employer's asserted reason." *Id.* at 517. Moreover,"[t]hat the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct." *Id.* at 524; *see also Kendall v. Watkins*, 998 F.2d 848, 851-52 (10th Cir. 1993) ("'[E]vidence that the articulated business reason for the decision was pretextual does not compel the conclusion that the employer intentionally discriminated.'") (*quoting Sanchez*, 992 F. 2d at 247), cert. denied sub nom, *Kendall v. O'Leary*, 510 U.S. 1120 (1994). Thus, although Plaintiff may have presented

evidence which could be interpreted as discrediting Defendants' proffered reason, this evidence does not necessarily fulfill Plaintiff's ultimate responsibility pf persuading the jury that race was a motivating factor in the employment decision. *See Hicks*, 509 U.S. at 509, 514-15 ("[N]othing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of is action was not believable."); *Hurd*, 109 F.3d at 1548 (stating that the credibility of the proffered reason is relevant to whether adverse action was intentionally discriminatory, but emphasizing that plaintiff must also prove purposeful discrimination)

Therefore, if a jury does not believe the plaintiff's evidence that discriminatory intent motivated the adverse employment action, then the plaintiff has not met his ultimate burden of persuasion even if the jury also does not believe the defendant's proffered nondiscriminatory reason. That the jury in this case did not believe Defendant's proffered reason does not mean that it believed that intentional racial discrimination was the reason for not hiring Plaintiff. *See Kendall*, 998 F.2d at 851-52 ("'If a plaintiff successfully proves that the defendant's reasons are not worthy of credence, the plaintiff must still prove that the true motive for the employment decision violates Title VII.'") (*quoting Sanchez*, 992 F.2d at 247). Because Plaintiff remained obligated to meet his ultimate burden of persuasion, the evidence presented by him to establish a prima facie case of discrimination "[was] infinitely less than what a direct verdict requires." *Hicks*, 509 U. S. at 515. Accordingly, despite evidence that may be viewed as discrediting Defendants' legitimate,

nondiscriminatory reason, the district court did not err in refusing to grant Plaintiff a judgment as a matter of law.

The final reason why Plaintiff's argument that he was entitled to a judgment as a matter of law fails is because it is premised on his misunderstanding of *Hicks*. Plaintiff asserts that, under Hicks, he is entitled to a judgment as a matter of law because he established a prima facie case and Defendants did not sustain their burden of production by rebutting the presumption of discrimination. *See Appellant's Reply Br.* at 8. In fact, *Hicks* says that "[i]f the defendant has failed to sustain its burden but reasonable minds could differ as to whether a preponderance of the evidence establishes the facts of a prima facie case, then a question of fact does remain, which the trier of fact will be called upon to answer." *Hicks*, 509 U.S. at 509-10. Therefore, even if Defendants had failed to meet their burden of production, Plaintiff's facts in this case were contested and reasonable minds could differ as to whether he established a prima facie case by a preponderance of the evidence.

Plaintiff did not prove that Defendants received all sixty applications that he allegedly submitted; he only presented evidence showing that they had received four of his applications. As noted above, several defense witnesses testified that they had no recollection of any applications made by Plaintiff, and as a result, they deduced that either they had not received any or that the applications had been lost, discarded, or rejected. Further, Plaintiff's evidence that Defendants sent him four letters of receipt does not necessarily invalidate Defendants explanation. The jury could draw any number of inferences from this evidence. For example, the jury could infer that Defendants' proffered reason was pretext.

Alternatively, the jury could draw inferences from the absence of those four applications in Defendants' employment files, along with the letters of receipt, about Defendants' hiring practices, i.e., that Defendants did what they said they did with Plaintiff's applications-they lost, discarded, or rejected them. Thus, the evidence could be considered by jury as circumstantial proof that Plaintiff's *prima facie* case was not supported by a preponderance of the evidence. Stated differently, the evidence shows that Plaintiff could have been rejected for benign reasons, not because of invidious discrimination on the basis of his race. We agree with the district court's implicit finding that reasonable minds could differ "as to whether a preponderance of the evidence establishes the facts of a prima facie case." *Id.* This precluded the court from granting Plaintiff a judgment as a matter of law.

For these reasons, we conclude that the court did not err in denying the motion for a judgment as a matter of law. Even assuming that Plaintiff discredited Defendants' legitimate,, nondiscriminatory reason,, he still was required to "prove to the factfinder that the motivation for not hiring was race."[4] *Appellant's App.* at 128. The district court properly left this question for the jury to decide because, when construed in a light most favorable to Defendants, the evidence did not point in only one direction-it raised a genuine issue of fact as to whether Defendants discriminated against Plaintiff. *See Burdine*, 450 U.S. at 254-55. "Title VII does not award damages against employers who cannot prove a discriminatory

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[4] Implicit in our conclusion is our rejection of Plaintiff's allegation that the burden never shifted back to him. We have determined that Defendants met their burden of production by articulating a legitimate, nondiscriminatory reason for failing to hire Plaintiff. In any event, the burden of persuasion remains at all times with Plaintiff. *See Burdine*, 450 U. S. at 253.

reason for adverse employment action, but only against employers who are proven to have taken adverse employment action by reason of ... race." *Hicks*, 509 U. S. at 523-24.

II.

Plaintiff's second principal argument is that the court erred in denying his motion for a new trial because the verdict was contrary to the weight of the evidence. He contends that the evidence proffered by Defendants' testimony that Defendants had hired some African-American pharmacists in Albuquerque and that race had never been a factor in their hiring decisions-was insufficient to justify a verdict for Defendants because it consisted of after-accord evidence. We review the district court's decision to deny a motion for a new trial only for an abuse of discretion. *See McDonough Power Equip., Inc. v. Greenwood*, 464 U. S. 548-556 (1984); *Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186, 1193 (10th Cir. 1997). Where a new trial motion asserts that the jury verdict is not supported by the evidence, "the verdict must stand unless it is 'clearly, decidely, or overwhelmingly against the weight of the evidence.'" *York v. American Tel. & Tel. Co.*, 95 F.3d 948, 958 (10th Cir. 1996) (*quoting Black v. Hieb's Enters., Inc.* 805 F.2d 360, 363 (10th Cir. 1986)). With respect to our review of the jury's verdict, we consider the record evidence in the light most favorable to the prevailing party. *See Koch v. City of Hutchinson*, 814 f .2d 1489, 1496 (10th Cir. 1987).

We disagree with Plaintiff's assertion that the jury verdict is not supported by the weight of the evidence for several reasons. First, we reemphasize our holdings which are relevant to this argument: (1) Defendants sufficiently articulated legitimate, nondiscriminatory reason for not hiring

Plaintiff, and the reason was supported by circumstantial evidence of 'Defendants' hiring practices and Plaintiff's resume, applications, and employment history; and (2) the evidence to which Plaintiff objects does not constitute inadmissible after-acquired evidence within the meaning of *McKennon*, and it is admissible to show that Plaintiff's case was not supported by a preponderance of the evidence. To these conclusions we add our determination that the record evidence could reasonably be viewed as supporting the jury's verdict.

As noted above, the ultimate question before the jury was whether Defendants intentionally discriminated against Plaintiff, *see Aikens*, 460 U. S. at 715; the burden of persuasion on this matter remained at all times with Plaintiff. *See Burdine*, 450 U.S. at 253. The plaintiff must demonstrate that similarly situated persons were treated differently. *See Burdine*, 450 U.S. at 258 (*citing McDonnell Douglas*, 411 U.S. at 804). The mere failure to hire Plaintiff as compared to other qualified non-African-American candidates may not be sufficient to establish an inference of race discrimination. *Cf. Simpson v. Kay Jewelers*, 142 F. 3d 639,645 (3d Cir. 1998) (stating that mere favorable treatment of a younger manager as compared to an older manager may not be sufficient to support inference of age discrimination). Plaintiff did not present any direct evidence that Defendants discriminated against him or anyone else on account of race, and apparently Plaintiff's prima facie case alone did not convince the jury that Defendants engaged in intentional discrimination. Although Plaintiff presented some statistical evidence that no African-American pharmacists were hired during part of the period during which he was submitting applications. Defendants countered this evidence with testimony that they had hired six

of the nine African-American pharmacist registered in the state in 1994, they had offered a pharmacist position to an African-American in 1994, and race had never been a factor in their hiring decisions. The jury was free to assess the credibility of this testimony and weigh it accordingly. After learning that Plaintiff had four letters from Defendants, each of which indicated that they had received his application, Defendants did not dispute that they must have received four of Plaintiff's applications. Plaintiff, however, did not present evidence that Defendants received any other applications and the jury could have disbelieved Plaintiff's assertion that he submitted over sixty applications in a four-year period. Additionally, evidence in the record reasonably could support a jury determination that Defendants rejected Plaintiff's applications based on their facial deficiencies alone. That Defendants have no record of Plaintiff's applications and had no knowledge of who Plaintiff was before the suit was filed does not make the affirmative case of intentional discrimination. We cannot say that the jury's verdict was clearly, overwhelmingly, or decidedly against the weight of the evidence. The district court did err in denying Plaintiff's motion for a new trial.[5]

III.

Finally, Plaintiff contends that he was prejudiced by the court's failure to bifurcate the liability and damages phased of the trail. District courts have "broad discretion in deciding whether to sever issues for trial and the exercise of that discretion will set aside on it clearly abused." *Easton v. City of Boulder, Colo.*, 776 F.2d 1441, 1447 (10th Cir. 1985)

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[5] We need not address the district court's limiting instruction on after-acquired evidence because our determination concerning such evidence makes any further discussion superfluous.

(citing Fed. R. Civ. P. 42(b)), *cert. denied*, 479 U.S. 816 (1986). Our review of the record indicates, however, that Plaintiff did not ask the district court to bifurcate the proceedings. Therefore, we decline to address his argument. *See Walker v. Mather (In re Walker)*, 959 F.2d 894, 896 (10th Cir. 1992) (stating that federal appellate court generally will not consider an issue on appeal that was not raised in the trial court). We note that, even if the court could bifurcated the proceedings on its own motion under Federal Rule of Civil Procedure 42, we see no indication that it abused its discretion in not doing so. *Cf. York*, 95 F.3d at 958 (holding that district court did not abuse its discretion in denying motion to bifurcate because movant did show that she was significantly prejudiced). Accordingly, we affirm the district court's denials of Plaintiff's motion for a judgment as a matter of law and for a new trial.

AFFIRMED.

APPENDIX B
MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO DATED FEBRUARY 2, 1997

No. CIV 95-684 SC/LFG

CHIBU ANAEME, Plaintiff,

vs.

DIAGNOSTEK, INC., HEALTH CARE SERVICES, INC., and HPI HEALTH CARE SERVICES, INC., Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Plaintiff's Motion for a New Trial, filed August 9, 1996 (Doc. No. 47). For the reasons contained in this opinion, the motion will be DENIED.

This case was tried by a jury on July 22-25, 1996, resulting in a verdict for the Defendants, who will be referred to in this opinion collectively as "Diagnostek." Plaintiff Chibu Anaeme, a Black man, had applied for numerous pharmacist positions with Diagnostek and was never called for an interview, much less hired. He claimed his race was the reason he was not hired. The "legitimate business reason" given by Diagnostek for not hiring Mr. Anaeme was that the employer had no record of having received his applications. An unusual feature of the case was that Mr. Anaeme had received and kept four letters from Diagnostek thanking him for applying for some of the positions in question. Nevertheless, the jury decided the case against him.

Plaintiff gives three reasons why he should be given a new trial: (1) the jury's verdict is contrary to the weight of the evidence; (2) the jury ignored the Court's limiting instruction and erroneously considered after- acquired evidence in determining liability; and (3) the judgment, if enforced, will result in a miscarriage of justice.

I. Weight of the Evidence.

A motion for new trial made on the ground that the jury's verdict is contrary to the weight of the evidence presents a question of fact addressed to the discretion of the trial court. *Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119, 1125 (10th Cir. 1995). The question is whether the verdict is clearly, decidedly, or overwhelmingly against the weight of the evidence. *Id.*

Plaintiff argues that the evidence was uncontroverted as to each and every element of his prima facie case. That is, (1) he is Black, (2) he was qualified for the jobs when he applied, (3) he was not hired, and (4) less qualified or equally qualified non-Black applicants were hired. Plaintiff's qualifications included a B.S. degree in Pharmacy and a New Mexico pharmacy license, and non-Blacks with less experience than Plaintiff were hired. This is sufficient to meet Plaintiff's prima facie burden and raises an inference of discrimination. It does not guarantee a verdict for Plaintiff, however.

Defendants argue first that Plaintiff did not establish the second and fourth elements, that he was qualified for the position of pharmacist, or that applicants were hired who were less qualified than Plaintiff. They cite numerous facts that I ruled could not be considered by the jury on the issue of liability under the "after-acquired evidence" doctrine

announced in *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995). In the Tenth Circuit before *McKennon*, after-acquired evidence about a plaintiff's job qualifications, performance or misconduct could be used to preclude any relief. *See, e.g., Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700, 708 (10th Cir. 1988) (after-acquired evidence which would have justified employer's firing of plaintiff may preclude grant of any relief to plaintiff in age and religious discrimination suit); *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1427 (10th Cir. 1993) (employer entitled to jury instruction on defense that some plaintiffs in age discrimination case were not qualified to perform work and would not have been hired). These cases are no longer good law after *McKennon*; *Summers* was specifically overruled. For that reason I instructed the jury not to consider any after-acquired evidence about Plaintiff's qualifications on the issue of liability.

Defendants also argue that they proffered a valid business reason for not hiring Plaintiff: they had not received his applications. This reason was effectively rebutted by Plaintiff, who produced the aforementioned thank-you letters from Diagnostek for some of the applications he had submitted. Diagnostek presented some evidence, however weak, that its personnel practices did not run smoothly, raising the inference that Plaintiff's applications may have been received but because of inadvertence may not have been sent to the proper hiring managers. If this were all the evidence presented by Diagnostek, I might rule that Plaintiff was entitled to a new trial.

Defendants' final argument, and the only one that I find persuasive, is that Plaintiff did not prove that Diagnostek intentionally discriminated against him because of his race. In

fact, this case illustrates that while submission by the employer of a discredited reason for failing to hire a person is evidence of discriminatory motive, it does not necessarily prove the jury's "ultimate inquiry" of intentional racial discrimination.

The Supreme Court has made clear, and the jury was instructed, that the ultimate inquiry is whether the employer intentionally discriminated against the plaintiff. *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983). The Tenth Circuit has held that even if a plaintiff presents a prima facie case of discrimination and proves that an employer's proffered business reason was pretextual, the conclusion that the employer intentionally discriminated against the plaintiff in violation of Title VII is not compelled. *Elmore v. Capstan, Inc.*, 58 F.3d 525, 531-32 (10th Cir. 1995); *Kendall v. Watkins*, 998 F.2d 848, 851-52 (10th Cir. 1993); *Sanchez v. Phillip Morris, Inc.*, 992 F.2d 244, 246-47 (10th Cir. 1993) .

Plaintiff presented no direct evidence that Diagnostek discriminated against him or any other Blacks because of race. He had some statistical evidence that no Black pharmacists were hired during part of the period he was submitting his applications. Diagnostek countered with testimony that several Black pharmacists have been hired by Diagnostek, and that race has never been a factor in the employer's hiring decisions. I find and conclude that the verdict was not clearly, decidedly, or overwhelmingly against the weight of the evidence.

II. After-Acquired Evidence.

Plaintiff argues there was prejudicial error in that the jury failed to follow the Court's limiting instruction on the relevance of after-acquired evidence. Evidence was presented

by Diagnostek at trial that after Plaintiff filed his charge of discrimination with the EEOC, Diagnostek discovered some negative information about his work performance with prior employers that would have caused them to reject Plaintiff for hire. He had been terminated from several pharmacist positions, and in some material ways his applications for employment with Diagnostek were incomplete and misleading. This presented a jury question on whether the negative evidence was serious enough to have caused Diagnostek not to hire Mr. Anaeme had it been known, and if so on what date the employer learned of the information. *Ricky v. Mapco, Inc.*, 50 F.3d 874, 876 (10th Cir. 1995). The parties drafted an instruction, and accepted the Court's modification; the final product reads:

> Any and all evidence of Plaintiff's failure to fully inform or disclose material information in his applications for employment is to be considered only on the issue of damages. You are not to consider any evidence acquired by Defendants after Plaintiff filed his charge of discrimination with the Equal Employment Opportunity Commission ... on the issue of whether Defendants discriminated against Plaintiff on the basis of his race ... Plaintiff argues that the jury was either confused about or ignored this instruction, which was given several times during the trial, and that the jury inappropriately considered the after-acquired evidence on the issue of liability.

I conclude that the limiting instruction was sufficient to inform the jury of the proper use of the after-acquired evidence. Even though it can be difficult for jurors to follow limiting instructions on evidence, I am not convinced that the jury considered the after-acquired evidence improperly in this case.

III. Miscarriage of Justice.

Plaintiff argues that the evidence unequivocally demonstrated that Defendants had refused to hire him for illegitimate, discriminatory business reasons, and that Defendants presented no credible business reason for its employment decisions with regard to Plaintiff. He argues that in light of the strong, uncontroverted factual and legal basis for his claims, the verdict rendered by the jury has resulted in a miscarriage of justice. He argues that the Court has discretion to grant a new trial if it considers the verdict to be wrong even though supported by some evidence.

I can easily dispose of this argument, as I do not consider the jury's verdict to be wrong.

NOW, THEREFORE, IT IS ORDERED that Plaintiff's Motion for a New Trial should be and is hereby DENIED.

SENIOR UNITED STATES DISTRICT JUDGE

Counsel for Plaintiff: Michael E. Mozes, Albuquerque, N.M.

Counsel for Defendants: Stanley K. Kotovsky, Jr., HINKLE, COX, EATON, COFFIELD & HENSLEY, Albuquerque, N.M..

APPENDIX C
JUDGMENT
OF THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW MEXICO
DATED JULY 30, 1996

CIV 95-684 SC/LFG

CHIBU ANAEME, Plaintiff,

vs.

DIAGNOSTEK, INC.,
HEALTH CARE SERVICES, INC., and
HPI HEALTH CARE SERVICES, INC., Defendants.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Santiago E. Campos, District Judge, presiding, and the issues having been duly tried and the jury having duly entered its verdict,

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing and that the action be dismissed on the merits.

ROBERT M. MARCH,

Clerk

APPENDIX D
MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO DATED JULY 26, 1996

No. CIV 95-684 SC/LFG

CHIBUE ANAEME, PLAINTIFF

vs.

DIAGNOSTEK, INC., HEALTH CARE SERVICES, INC., HPI HEALTH CARE SERVICES, INC., DEFENDANTS

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendants' Motion for Summary Judgment, filed May 31, 1996 (Doc. No. 30). For the reasons contained in this Opinion, the motion will be GRANTED IN PART and DENIED IN PART. Plaintiff, who is Black, alleges racial discrimination in employment. He brings claims for disparate treatment (Court I) and disparate impact (Court II) under Title VII, and a claim for racial discrimination under 42 U.S.C. Section (Court III). Plaintiff applied multiple times for pharmacist positions with Defendants.[6] These applications were submitted during the

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[6] According to the Complaint, Defendant Diagnostek, Inc. is a corporation, and Defendants Health Care Services and HPI Health Care Services, Inc., are wholly-owned subsidiaries of Diagnostek.

period May 1991 to September 1994. He was never hired: he was never even interviewed.

Disparate Treatment (Title VII) and Racial Discrimination (Section 1981). Defendants based their motion for summary judgment on several grounds. The first is that Plaintiff cannot make out a *prima facie* for disparate treatment or racial discrimination. In a failure to hire case, to make out a *prima facie* case of racial discrimination under Title VII and Section 1981, Plaintiff must show the following: (1) that he belong to a minority or protected class; (2) that he applied and was qualified for an available position; (3) that despite his qualifications he was not hired; and (4) that the position remained open or was filled by a person not in the protected class. *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 802 (1973); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1004 (10th Cir. 1996); *Drake v. City of Fort Collins*, 927 F.2d 1156, 1159 (10th Cir. 1991). Defendants contend that Plaintiff cannot make out the first element because even though is Black, none of their employees charged with hiring knew that he was Black. They further allege that Plaintiff was not qualified for the position of pharmacist.

Plaintiff has come forward to rebut Defendants' assertion that they were unaware of Plaintiff's race. Plaintiff actually worked with one of Defendants' affiants, Roy Storey, at a pharmacy at a local hospital. Mr. Stoney had overall responsibility for hiring pharmacist for Diagnostek. Additionally, Plaintiff worked with other employees of Defendants who allegedly were involved in the hiring process. I find that Plaintiff has made a sufficient showing that Defendants knew he was Black.

As for the second contention, that Plaintiff was not qualified, Defendants have not aimed their arrows at the right target. Their thrust is that if they had known certain things that were not disclosed in Plaintiff's applications, they would not have hired him or would have terminated him as soon as they found out. These things include that Plaintiff's employment had been involuntarily terminated by two or more prior employers, that he failed state pharmacy licensing examinations in three states, that he had been suspended from pharmacy college for poor grades, and that he had been employed as a pharmacist by numerous employers over the past eight years. Further, Plaintiff omitted the real reasons for leaving some of his jobs, and omitted periods of both unemployment and employment in pharmacy and other fields.

Plaintiff points out that Defendants have failed to present any evidence that he was not qualified for the positions of pharmacist for which he applied. The qualifications included a pharmacy degree, licensure and related work experience, all of which Plaintiff showed in his applications and resume. Plaintiff argues that such omissions in his applications do not impact his basic qualifications: they may only go to the issue of tolling of damages under the "after-acquired evidence" doctrine, *McKennon v. Nashville Banner Pub. Co.*, ___ U.S. ___, 115 S.Ct. 879, 886 (1995). The after-acquired evidence doctrine is not part of the *McDonnell Douglas* analysis of a *prima facie* case, and is discussed later in this opinion.

The question of whether a plaintiff was qualified for a position for which he applied is simply whether he met the criteria set forth in the announcement. Plaintiff has come forward with sufficient evidence that he was qualified to meet his *prima facie* burden. Thus, Defendants must show that

they rejected him on the basis of a legitimate, non-discriminatory reason. *McDonnell Douglas*, 411 U.S. at 802; *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981). Defendants have failed to satisfy their burden of production in this regard. Absent from either of Defendants' briefs is any stated legitimate, nondiscriminatory business reason for its decisions not to interview or to hire Plaintiff for any of the positions for which he applied. Because no reason at all had been given, either bona fide or pretexual, for Defendants' failure to consider Plaintiff for employment, the issue of pretext does not even arise, *McDonnell Douglas*, 411 U.S. at 804 *Burdine*, 450 U. S. at 253-54.

I conclude that Defendants are not entitled to summary judgment on the disparate treatment and racial discrimination claims under Title VII and Section 1981 (Counts I and III).

Disparate Impact. Defendants contend that Plaintiff cannot make out a case of disparate impact under Title VII. A disparate impact theory of recovery involves employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. *Faulkner v. Super Valu Stores. Inc.*, 3 F.3d 1419, 1428 (10th Cir. 1993); *Ortega v. Safeway Stores. Inc.*, 943 F.2d 1230, 1243 (10th Cir. 1991). To establish a *prima facie* case of disparate impact discrimination, the plaintiff must show that a specific identifiable employment practice or policy caused a significant disparate impact on a protected group. *Faulkner*, 3 F.3d at 1428; *Ortega*, 942 F.2d at 1242. Statistics may be used to establish a *prima facie* case of disparate impact. *Faulkner*, 3 F.3d at 1428, *citing Wards Cove Packing Co. v.*

Atonio, 490 U.S. 642, 650 (1989). In fact the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the employment practice or policy has caused the disparate impact on members of the protected group. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988).

Plaintiff identifies two policies of Defendants that he contends have combined to exclude Black applicants from pharmacist positions. One is the policy of hiring pharmacy interns solely from UNM College of Pharmacy, and the other is the corresponding policy of giving preference in hiring for pharmacist jobs to persons who have previously worked as pharmacy interns. This satisfies one prong of his *prima facie* case. What he has failed to show, however, is any evidence of a resultant disparate impact on Blacks.

Plaintiff alleges in his Complaint that seven percent (7%) of Diagnostek employees hired or rehire during relevant period were Black. He further alleges that during the same period, 13 Blacks were hired or rehired as permanent or relief pharmacist. This hardly helps his disparate impact claim, given Defendants' statistic that Blacks make up only 1.82% of the New Mexico population. The only other evidence alluded to by Plaintiff is presented as legal argument.

When Plaintiff first applied for a staff pharmacist position with Diagnostek in 1991, there were no Black pharmacist interns employed by Diagnostek. In fact, no Black pharmacist interns were hired until November 1993. This was true in spite of the fact Black students attended the UNM College of Pharmacy and other Blacks applied for pharmacist openings.

Pl. Mem. at 11. Even assuming these "facts" to be true, they would be insufficient to defeat summary judgment on the disparate impact claim. What is missing is any evidence that during the relevant times, UNM had fewer Black students than expected in its College of Pharmacy, that any Black student at UNM applied and were rejected for intern positions by Diagnostek, or that Blacks were under-represented in the numbers of pharmacists hired by Diagnostek. Plaintiff has failed to present a prima facie case of disparate impact discrimination.

Defendants' motion for summary judgment will be granted on the disparate impact claim in Court II.

After-Acquired Evidence. In *McKennon v. Nashville Banner Pub. Co.*, ____ U.S. ____, 115 S.Ct. 879 (1995) the Supreme Court addressed the doctrine of after-acquired evidence, in which an employer discovers information about an employee's misconduct during litigation that would have caused it to terminate the Plaintiff. In order to rely on the after-acquired evidence doctrine, the employer must show that the plaintiff's wrongdoing was of such severity that it would have taken the same employment action based on that misconduct alone. *Id.*, 115 S. Ct. at 886-87. In a unanimous decision, the Court held that after-acquired evidence cannot absolve am employer of liability for discrimination, but that it can affect the remedies available to the plaintiff. *Id.* In particular, it can bar reinstatement and front pay, and can have an effect on the measure of backpay. *Id.* at 886. The Court did not adopt a hard and fast rule with respect to the proper measure of backpay; rather, it advised that courts should engage in an analysis of "extraordinary equitable circumstances that affect the legitimate interests of either

party." *Id.* The beginning point of the calculation of backpay should be the period between the date of the adverse employment action and the date of discovery of the new information. *Id.*

Defendants argue that they are entitled to an order limiting Plaintiff's damages based on this doctrine. As mentioned above, Defendants have presented ample evidence that had they known certain details about Plaintiff's educational, licensing, and work history, some of which was requested in but missing from the applications filed out by Plaintiff, they would not have hired him or they would have terminated him if he had been hired. Plaintiff filed an EEOC charge against Defendants on September 8, 1994, and by October 5,1994 they had determined that his applications were not complete in that they did not include all his prior employment or the reasons he left some of his jobs.

Plaintiff argues that his damages should not be limited by the doctrine of after-acquired evidence because the evidence of Plaintiff's alleged misrepresentations and omissions on his applications is not of sufficient severity. He contends that his application forms were accompanied by his resume and that together they included all his employment history that was material to the pharmacist positions for which he applied.

I have examined the three 1993 applications in evidence (dated Jan. 7, Feb. 25, and Mar. 8 respectively) as well as Plaintiff's resume. I disagree that they contain all material information that was requested. The applications request the applicant to list "all employment and periods of unemployment for the last 10 years. "The first two applications fail to list Plaintiff's employment at Furr's pharmacy, which was

Plaintiff's longest period of relevant pharmaceutical employment. Plaintiff was demoted and then either fired from Furr's, or he may have resigned in protest over having his pay and hours cut. The third application list Furr's, but dies not list UNM Hospital pharmacy, which was his most recent pharmacy employment. Plaintiff was fired from UNM Hospital, allegedly for poor work performance and misrepresentations in his application. Also, even though the third application lists Furr's, it does not list the reason for leaving, except to say "contact Furr's personnel office. "All three applications contain a notation that additional employment information is contained in an attached resume. Plaintiff's employment with Furr's and UNM Hospital is discussed in the resume, but not his reasons for leaving. For UNM Hospital, no reason at all is given; for Furr's the reason given is "personal."

Lawsuits were filed over the Furr's and UNM Hospital terminations. The Furr's lawsuit resulted in a confidentiality agreement that Plaintiff argues "compelled" him not to reveal the reasons he was no longer a Furr's employee. The confidentiality agreement is not in evidence, and I fail to see how such an agreement between Plaintiff and Furr's would impact on these Defendants' right to know the reasons for Plaintiff's leaving his former employment.

Additionally, there are gaps in Plaintiff's recent employment history that are not filled in either by the applications or the resume. He was employed in janitorial and other non-pharmacy positions for long periods in 1991 to 1993. He was omitted his pharmacy intern positions in the early to mid-1980s, which were within the 10-year period requested in the application. Defendants contend they would not have hired

Plaintiff if they had known of these omissions, and that the sheer number of different jobs would have caused them to refuse him employment.

Defendants have stated their policy is against hiring applicants who have been terminated by two or more prior employers, who were suspended from pharmacy school for poor grades, or who failed to provide the true reasons for leaving employment, including involuntary termination. To rebut these assertions, Plaintiff has challenged only two of Defendants' statements of material facts (Nos. 26 and 30) and has failed to challenge several others (Nos. 25, 28, 32 and 34). In his challenge to the assertion that the Defendants would have refused employment to an applicant who omitted from his application all of his employment in the past 10 years, Plaintiff asserts the Defendants would not have refused employment if the applicant included all the requested information in a resume. Plaintiff has failed to come forward with sufficient information to rebut that he would not have been hired if Defendants had known all the things about him that they know now. What is missing is any evidence that Defendants hired or failed to terminate any person who had failed to submit a complete employment history for the past 10 years, or who omitted the reasons they left prior employment, or who had been involuntarily terminated by two or more prior employers.

I agree with Plaintiff that it was perfectly reasonable for him to submit his resume as a supplement to the applications, and that some of Defendants' assertions about the materiality of omission in his applications are untenable. But the sum of the two documents still fails to give a complete and accurate picture of his employment history, and so the resume did cure

his failure to make the applications more complete. I agree with Defendants that employers may reasonably request all employment experience for a given time period to preclude the type of selective memory and interpretation utilized by the plaintiff here, who gives various reasons for not listing certain information in his applications and resume.

I am not convinced that some of Defendants' other assertions of materiality are valid, because the information was not requested in the application. These include such things as being suspended from the college of pharmacy for poor grades on semester (he eventually graduated) and failing licensing examinations (he eventually passed). Unless Defendants can satisfy their burden of proof by showing that this is information they would have asked for in an interview had an interview been granted, or that they rejected applicants based on this type of information, I will not consider these factors in deciding the backpay issues.

NOW, THEREFORE, IT IS ORDERED that Defendants' Motion for Summary Judgment is hereby DENIED as to Counts I and III;

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment is hereby GRANTED as to Count II;

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment is hereby GRANTED on the after-acquired evidence doctrine and that no front pay of instatement will be ordered if Plaintiff prevails at trial. The calculation of backpay will resolved after the jury's verdict had been rendered.

UNITED STATES DISTRICT JUDGE

Counsel for Plaintiff: Michael E. Mozes, Albuquerque, N. M.
Counsel for Defendants: Robert P. Tinin, Jr. and Stanley K. Kotovsky, Jr., HINKLE, COX, 1

According to the Complaint, Defendant Diagnostek, Inc. is a corporation, and Defendants Health Care Services and HPI Health Care Services, Inc., are wholly-owned subsidiaries of Diagnostek.